

STATE OF NEW MEXICO
DEPARTMENT OF CULTURAL AFFAIRS

REPORT

CAPITAL APPROPRIATIONS FOR
FRESCO PROJECT

JUNE 20, 2011

MOSS-ADAMS LLP

Certified Public Accountants | Business Consultants

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MOSS-ADAMS LLP
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Report on Procedures Performed

Veronica Gonzales, Secretary
State of New Mexico Department of Cultural Affairs

Thank you for the opportunity to perform the consulting procedures for the State of New Mexico Department of Cultural Affairs (DCA). This report summarizes our findings relating to expenditures of capital appropriations for the fresco art project at the National Hispanic Cultural Center.

This engagement was performed in accordance with Standards for Consulting Services established by the American Institute of Certified Public Accountants as outlined in our engagement letter dated April 27, 2011. The scope of this engagement is outlined in the body of our report.

This report was developed based on information obtained from our review of documents and interviews of employees at DCA and the National Hispanic Cultural Center Foundation (Foundation).

This report is intended solely for the use of DCA. This report should not be disclosed to, used or relied upon by any third party. Moss Adams LLP does not accept any responsibility to any other party to whom this report may be shown or into whose hands it may come.

We appreciate the opportunity to help you with this project. Please do not hesitate to contact us at (505) 878-7200 if you have any questions or need further assistance regarding this important matter. Moss Adams would like to sincerely thank the DCA and Foundation's staff for their help in assisting us with our procedures.

Moss Adams LLP

Albuquerque, New Mexico
June 20, 2011

Praxity MEMBER GLOBAL ALLIANCE OF INDEPENDENT FIRMS

STATE OF NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS
EXECUTIVE SUMMARY

We completed the procedures enumerated in the scope section of our report for the three legislative appropriations related to the fresco art project at the National Hispanic Cultural Center. The results are summarized as follows:

The first two appropriations, totaling $527,000, were for the purchase of the fresco painting. The funds were used to purchase art in accordance with the appropriations. However, the funds were advanced to the Foundation contrary to the purchase agreement.

The third appropriation in the amount of $285,000 was from severance tax bond proceeds which are for capital projects. Thus, it appears this appropriation was and continues to be subject to the State Procurement Code. Through correspondence with DCA, the Foundation was made aware of capital project and Procurement Code requirements. The Foundation has returned $138,360.97 of this appropriation.

To comply with state statutes, DCA must use the entire appropriation for the intended capital project before it expires on June 30, 2012 or return it to the Department of Finance and Administration.

Our examination was limited to the areas and periods described and limited to the documents available and interviews performed. Had we reviewed other periods or areas or documents, other matters may have been identified warranting DCA's attention.

STATE OF NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS
ENGAGEMENT SCOPE

The following is the listing of the procedures that were to be performed. The results of these procedures are reported in the next sections of this report.

1. Obtain the legislative appropriations and related procurement records from DCA and review for compliance with the applicable state statutes.

2. Obtain the detail of expenditures and related supporting documents from the National Hispanic Cultural Center Foundation. Review these for compliance with the appropriation language and other state statutes notes as applicable.

3. Conduct follow-up inquiry and procedures as determined necessary based on the testwork above.

4. Identify any breakdown in internal controls and provide for recommendations for improvement.

5. Prepare a report summarizing the results of these procedures.

STATE OF NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS
PROCEDURES AND OBSERVATIONS

1. LEGISLATIVE APPROPRIATIONS

Laws of 2007, Chapter 2, Section 5, #1 $100,000

Laws of 2007, Chapter 42, Section 41, #2 $427,500

Laws of 2007 Chapter 2, Section 5, #1 and Laws of 2007, Chapter 42, Section 41 (Appendix A) were both established "for a fresco painting at the Torreon building at the National Hispanic Cultural Center." We could not locate a purchase agreement at DCA. A purchase agreement (Appendix B) subsequently provided by the Foundation was entered into between DCA and the Foundation; however, it was not signed by anyone from DCA. We reviewed the purchase agreement, the detail of expenditures of the Foundation, and performed inquiries of the Foundation's management. Based on our review, the purchase of artwork was properly exempt from the Procurement Code Section 13-1-98T NMSA 1978. DCA paid for and received a fresco painting in accordance with the language in the 2007 appropriation.

Based on our discussions with DCA, the invoice to pay the Foundation $527,500 was approved by a financial specialist of DCA. The invoice is dated August 23, 2007 and was paid on August 27, 2007 by warrant B1000573405.

The purchase agreement in Section IV(a) indicates that the Foundation was to certify the fresco was obtained prior to payment. The payment was made in 2007 before the fresco was finished in 2010.

Laws of 2008, Chapter 97, Section 7, #4 $285,000

Laws of 2008, Chapter 97, Section 7 (Appendix A) was established "to construct the Torreon fresco project at the National Hispanic Cultural Center." A second purchase agreement (Appendix C) was entered into between DCA and the Foundation on August 22, 2008. This agreement is "for additional artwork and transfer and convey title to the fresco painting to the Department." The purchase agreement also refers to the appropriation language. It is not clear in the agreement whether it was for artwork related to the fresco or not. With respect to the 2008 appropriation and the purchase agreement, we noted the following:

a. The appropriation uses the word "construct." As defined by NMAC 2.61.6.8.A(2)(c), this refers to "a structure or space including fixtures and other built-ins, but not including furnishings or moveable equipment." This appropriation therefore appears not to include the purchase of art. Rather, based on our discussion with the Foundation and DCA personnel, the Torreon building needs improved lighting, roofing, HVAC and other items to properly safeguard the fresco and it appears this was the purpose of the appropriation. Considering the above, it seems the purchase agreement does not include items that are allowable under the appropriation.

b. Art purchases are exempt from the Procurement Code under Section 13-1-98T NMSA 1978. However, the project indicated in the appropriation does not appear to fall under this exemption and the Procurement Code should have been followed.

c. Because the language in the purchase agreement is not clear, we could not determine why DCA is paying additional funding to purchase a fresco painting when a purchase has already been made using appropriations from Laws of 2007.

Per our discussions with DCA staff, it is not known who approved the payment of $285,000 to the Foundation. The invoice is dated August 15, 2008.

2. REVIEW OF EXPENDITURES

We reviewed the purchase agreements and it is not clear which statutes apply or govern since, according to the agreement, the purchase is exempt from the Procurement Code. Based on our review of the list of expenditures for the 2008 appropriation provided to us by the Foundation, we did not note expenditures that are consistent with the purpose of the 2008 appropriation.

On March 31, 2011, the Foundation refunded the Department $138,360.97.

3. FOLLOW-UP INQUIRIES

We performed follow-up inquires of staff at DCA and the Foundation as noted above.

STATE OF NEW MEXICO DEPARTMENT OF CULTURAL AFFAIRS
RECOMMENDATIONS

Overall, our procedures and observations indicated there was a lack of recordkeeping and oversight at DCA over these capital outlay appropriations. The normal procedures that are in place at DCA were not followed. DCA did not maintain the purchase agreements made between DCA and the Foundation. The copy of the purchase agreement provided to us was not signed or was signed after a DCA was invoiced. Paragraph IV.(a) in the purchase agreement requires certification that the Foundation completed the fresco; however, the certification was not received prior to payment. In addition, the language in the 2008 appropriation did not match the purchase agreement signed by DCA.

We recommend that DCA develop and implement additional control procedures to ensure that compliance with state statutes is performed as it relates to capital outlay appropriations. This should include procedures to monitor compliance with capital outlay provisions and ensure compliance with the New Mexico State Procurement Code when applicable. It should also include procedures to develop clear purchase agreements with vendors, monitor compliance with the purchase agreements and only disburse funds when the provisions of the purchase agreements have been met.

To ensure that these procedures are followed, staff from the DCA Administrative Services Division should maintain the records and approve all purchase agreements and disbursements for capital outlay projects.

APPENDIX A

GENERAL FUND.--The following amounts are appropriated from the general fund to the cultural affairs department for expenditure in fiscal years 2007 through 2011, unless otherwise provided in Section 2 of this act, for the following purposes:

1. twenty-five thousand dollars ($25,000) to purchase equipment for a bilingual, multicultural and intergenerational art and theater organization in Albuquerque in Bernalillo county;

2. four hundred twenty-seven thousand five hundred dollars ($427,500) for a fresco painting at the Torreon building at the national Hispanic cultural center in Albuquerque in Bernalillo county;

3. four hundred twenty-five thousand dollars ($425,000) to construct, equip and furnish the Pete V. Domenici education building at the national Hispanic cultural center in Albuquerque in Bernalillo county;

4. three hundred ninety-nine thousand two hundred eighty-five dollars ($399,285) to plan, design and construct educational facilities, including classrooms, lunchrooms and an auditorium, at the New Mexico museum of natural history and science in Albuquerque in Bernalillo county;

5. eighty thousand dollars ($80,000) to plan, design, construct, equip and install improvements, including septic systems, stalls, landscaping, exhibits and

BONDS.--Pursuant to the provisions of Section 1 of this act, upon certification by the court of appeals that the need exists for the issuance of the bonds, six million dollars ($6,000,000) is appropriated to the court of appeals to construct a building for the court of appeals adjacent to the law school at the university of New Mexico in Albuquerque in Bernalillo county.

Section 7. CULTURAL AFFAIRS DEPARTMENT PROJECTS--SEVERANCE TAX BONDS.--Pursuant to the provisions of Section 1 of this act, upon certification by the cultural affairs department that the need exists for the issuance of the bonds, the following amounts are appropriated to the cultural affairs department for the following purposes:

1. one million seven hundred thirty thousand dollars ($1,730,000) to design and construct educational and office space at the museum of natural history and science in Albuquerque in Bernalillo county;

2. three hundred seventy thousand dollars ($370,000) to complete construction, furnish and equip the Pete V. Domenici education building at the national Hispanic cultural center in Albuquerque in Bernalillo county;

3. two hundred thousand dollars ($200,000) to equip and furnish the national Hispanic cultural center in Albuquerque in Bernalillo county;

4. two hundred eighty-five thousand dollars

($285,000) to construct the Torreon fresco project at the national Hispanic cultural center in Albuquerque in Bernalillo county;

5. two hundred sixty thousand dollars ($260,000) to plan, design and acquire land for a veterans' and military technology museum east of interstate 25 in Las Cruces in Dona Ana county;

6. one million five hundred thousand dollars ($1,500,000) to plan, design, renovate, construct and equip the New Mexico farm and ranch heritage museum, including information technology and related equipment, furniture and infrastructure, exhibits, a rural life center, the Tortugas kitchen, a special events arena and the main gallery, in Las Cruces in Dona Ana county;

7. one million five hundred thousand dollars ($1,500,000) to plan, design and construct the center for New Mexico archaeology on property donated by the United States bureau of land management in Santa Fe in Santa Fe county;

8. six hundred thousand dollars ($600,000) to plan, design, construct and renovate the Girard wing, including electrical infrastructure and storage upgrades, at the museum of international folk art in Santa Fe in Santa Fe county;

9. six hundred thousand dollars ($600,000) to furnish and equip the New Mexico history museum in Santa Fe

APPENDIX B

PURCHASE AGREEMENT

This Purchase Agreement ("Agreement") is entered into by and between the New Mexico Department of Cultural Affairs ("the Department") and the National Hispanic Cultural Center Foundation ("Foundation").

WHEREAS, the New Mexico State Legislature, pursuant to the Laws of 2007, Chapter 2, Section 5, Subsection 1, and the Laws of 2007, Chapter 42, Section 41, Subsection 2, appropriated a total sum of Five Hundred Twenty-Seven Thousand Dollars ($527,000) to the Department of Cultural Affairs for "a fresco painting at the Torreon building at the national Hispanic cultural center in Albuquerque in Bernalillo county" ("the Fresco painting"); and

WHEREAS, the Foundation is the agent holding the contract with Frederico Vigil, the Fresco painting artist; and

WHEREAS, pursuant to Sections 9-4A-1 *et seq.* NMSA 1978, the Department is empowered to enter into agreements for the purpose of obtaining real or personal property for Department use; and

WHEREAS, the Department wishes to purchase and the Foundation wishes to be the agent for this purchase of the Fresco painting for the benefit of the people of New Mexico and the National Hispanic Cultural Center in Albuquerque, New Mexico, and as directed by the New Mexico State Legislature.

NOW, THEREFORE, in consideration of the promises contained in this Agreement, it is mutually agreed between the parties that:

I. PURPOSE

This Agreement sets forth the terms and conditions upon which Foundation will acquire the Fresco painting for the National Hispanic Cultural Center, a division of the Department of Cultural Affairs. This Agreement is for the purchase of a work of art for display in a public building or place and, as such, is exempt from the provisions of the Procurement Code [§ 13-1-98 NMSA 1978].

II. FOUNDATION'S OBLIGATIONS

In consideration for the purchase price, the Foundation agrees to:

(a) Acting as the agent for the Fresco painting artist, transfer and convey title to the Fresco painting to the Department, free and clear of all liens, encumbrances and adverse claims.

IV. DEPARTMENT'S OBLIGATIONS

In consideration for transferring title and possession of the Fresco painting to the Department, the Department agrees to:

(a) Transfer a total of Five Hundred Twenty-Seven Thousand Dollars ($527,000), including gross receipts tax and all applicable state and federal taxes, to the Foundation, subject to availability of funds pursuant to the Appropriations Paragraph set forth below, upon receipt of statement certifying that the Foundation has acquired the Fresco painting at the Torreon Building at the National Hispanic Cultural Center.

VI: EFFECTIVE DATE AND TERM

This Agreement shall be effective on the date signed by all parties and terminate on June 30, 2008.

VII: APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Department to the Foundation. The Department's decision as to whether sufficient appropriations are available shall be accepted by the Foundation and shall be final. If the Department proposes an amendment to the Agreement to unilaterally reduce funding, the Foundation shall have the option to terminate the Agreement or to agree to the reduced funding within thirty (30) days of receipt of the proposed amendment.

VIII: LIABILITY AND RISK OF LOSS

No party shall be responsible for liability incurred as a result of another party's acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, § 41-1-1, *et seq.* NMSA 1978, as amended.

IX: AMENDMENTS

No amendments to this Agreement shall be valid unless made in writing and signed by all parties.

X: NOTICE

All notices and demands that are required or permitted to be given hereunder shall be in writing and forwarded to the parties as follows:

To the Foundation:
Clara Apodaca, President & CEO
National Hispanic Cultural Center Foundation
1701 4th Street SW
Albuquerque, New Mexico 87102

capodaca@nhccnm.org
505.766.9858

To the Department:
Stuart Ashman, Cabinet Secretary
Department of Cultural Affairs
Bataan Memorial Building
407 Galisteo St, Ste 260
Santa Fe, New Mexico 87501
(505) 827-6364

XI. SEVERABILITY

All agreements and covenants in this Agreement are severable, and if a court or arbitration panel with jurisdiction finds any clause invalid or illegal, it shall be revised to comply with applicable law if possible, or else stricken, and the remainder of this Agreement shall be enforced to the extent practicable.

XII. WAIVER OF BREACH

The waiver by any party of any provisions of this Agreement shall not operate or be construed as a waiver by that party of any subsequent breaches.

XIII. ASSIGNMENT

Except as specifically set forth herein, no party may assign, subcontract, or delegate its rights or responsibilities under this Agreement, in whole or in part, without the written consent of the other parties, and any attempt to do so shall be void.

XIV. RECORDS AND AUDITS

The Foundation shall maintain detailed records that indicate the date, time, and nature of transactions occuring in furtherance of this Agreement and retain them for a period of three (3) years from the date of final payment under this Agreement. The records shall be subject to inspection by the Department, the Department of Finance and Administration, and the State Auditor. The Department shall have the right to audit billings both before and after payment. Payment under this Agreement shall not foreclose the right of the Department to recover excessive or illegal payments.

XV. INDEMNIFICATION

The Foundation shall defend, indemnify and hold harmless the Department and the State of New Mexico from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this Agreement, caused by the negligent act or failure to act of the Foundation, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any

client of the Foundation resulting in injury or damage to persons or property during the time when the Foundation or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement.

XVI: ENTIRE AGREEMENT

This Agreement, with any incorporated exhibits, constitutes the entire agreement between the parties and supersedes all prior negotiations, representations, commitments, offers, contracts, and writings.

XVII. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on the date and year written above:

FOR THE DEPAREMENT OF CULTURAL AFFAIRS:

By:_____ **Date:**_____
Stuart Ashman, Cabinet Secretary

FOR FOUNDATION:

By: Clara Apodaca **Date** August 14, 2007
Clara Apodaca, President & CEO

APPENDIX C

PURCHASE AGREEMENT

This Purchase Agreement ("Agreement") is entered into by and between the New Mexico Department of Cultural Affairs ("the Department") and the National Hispanic Cultural Center Foundation ("Foundation").

WHEREAS, the New Mexico State Legislature, pursuant to the Laws of 2008, Chapter 92, Section 7, Subsection 4, appropriated a total sum of Two Hundred Eighty-Five Thousand Dollars ($285,000) to the Department of Cultural Affairs for "the Torreon fresco project at the national Hispanic cultural center in Albuquerque in Bernalillo county" ("the Fresco painting"); and

WHEREAS, the Foundation is the agent holding the contract with Frederico Vigil, the Fresco painting artist; and

WHEREAS, pursuant to Sections 9-4A-1 *et seq.* NMSA 1978, the Department is empowered to enter into agreements for the purpose of obtaining real or personal property for Department use; and

WHEREAS, the Department wishes to purchase and the Foundation wishes to be the agent for this purchase of the Fresco painting for the benefit of the people of New Mexico and the National Hispanic Cultural Center in Albuquerque, New Mexico, and as directed by the New Mexico State Legislature.

NOW, THEREFORE, in consideration of the promises contained in this Agreement, it is mutually agreed between the parties that:

I. PURPOSE

This Agreement sets forth the terms and conditions upon which Foundation will acquire the Fresco painting for the National Hispanic Cultural Center, a division of the Department of Cultural Affairs. This Agreement is for the purchase of a work of art for display in a public building or place and, as such, is exempt from the provisions of the Procurement Code [§ 13-1-98 NMSA 1978].

II. FOUNDATION'S OBLIGATIONS

In consideration for the purchase price, the Foundation agrees to:

(a) Acting as the agent for the Fresco painting artist, arrange for additional art work and transfer and convey title to the Fresco painting to the Department, free and clear of all liens, encumbrances and adverse claims.

III. DEPARTMENT'S OBLIGATIONS

In consideration for transferring title and possession of the Fresco painting to the Department, the Department agrees to:

(a) Transfer a total of Two Hundred Eighty-Five Thousand Dollars ($285,000), including gross receipts tax and all applicable state and federal taxes, to the Foundation, subject to availability of funds pursuant to the Appropriations Paragraph set forth below, upon receipt of statement certifying that the Foundation has acquired the Fresco painting at the Torreon Building at the National Hispanic Cultural Center.

VI. EFFECTIVE DATE AND TERM

This Agreement shall be effective on the date signed by all parties and terminate on June 30, 2009.

VII. APPROPRIATIONS

The terms of this Agreement are contingent upon sufficient appropriations and authorization being made by the Legislature of New Mexico for the performance of this Agreement. If sufficient appropriations and authorization are not made by the Legislature, this Agreement shall terminate immediately upon written notice being given by the Department to the Foundation. The Department's decision as to whether sufficient appropriations are available shall be accepted by the Foundation and shall be final. If the Department proposes an amendment to the Agreement to unilaterally reduce funding, the Foundation shall have the option to terminate the Agreement or to agree to the reduced funding within thirty (30) days of receipt of the proposed amendment.

VIII. LIABILITY AND RISK OF LOSS

No party shall be responsible for liability incurred as a result of another party's acts or omissions in connection with this Agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitations of the New Mexico Tort Claims Act, § 41-1-1, *et seq.* NMSA 1978, as amended.

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No amendments to this Agreement shall be valid unless made in writing and signed by all parties.

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Department of Cultural Affairs
Bataan Memorial Building
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Santa Fe, New Mexico 87501
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XI. SEVERABILITY

All agreements and covenants in this Agreement are severable, and if a court or arbitration panel with jurisdiction finds any clause invalid or illegal, it shall be revised to comply with applicable law if possible, or else stricken, and the remainder of this Agreement shall be enforced to the extent practicable.

XII. WAIVER OF BREACH

The waiver by any party of any provisions of this Agreement shall not operate or be construed as a waiver by that party of any subsequent breaches.

XIII. ASSIGNMENT

Except as specifically set forth herein, no party may assign, subcontract, or delegate its rights or responsibilities under this Agreement, in whole or in part, without the written consent of the other parties, and any attempt to do so shall be void.

XIV. RECORDS AND AUDITS

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XV. INDEMNIFICATION

The Foundation shall defend, indemnify and hold harmless the Department and the State of New Mexico from all actions, proceedings, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the

performance of this Agreement, caused by the negligent act or failure to act of the Foundation, its officers, employees, servants, subcontractors or agents, or if caused by the actions of any client of the Foundation resulting in injury or damage to persons or property during the time when the Foundation or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this Agreement.

XVI. ENTIRE AGREEMENT

This Agreement, with any incorporated exhibits, constitutes the entire agreement between the parties and supersedes all prior negotiations, representations, commitments, offers, contracts, and writings.

XVII. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico.

IN WITNESS WHEREOF, the parties hereto have executed this agreement on the date and year written above:

FOR THE DEPAREMENT OF CULTURAL AFFAIRS:

By: _____ Date: 8/22/08
Stuart Ashman, Cabinet Secretary

By: _____ Date: 8/22/08
DCA General Counsel, Certifying legal sufficiency

FOR FOUNDATION:

By: _____ Date: 8-26-08
Clara Apodaca, President & CEO